Supreme Court, U.S.
FILED

99 556 SEP 29 1999

OFFICE OF THE CLERK

No. 99-

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY CO.,
Petitioner,

v.

LINDA BAKER, Individually and as Personal Representative of the Estate of Phil Baker,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Georgia

PETITION FOR WRIT OF CERTIORARI

MARK E. TOTH
HALL, BLOCH, GARLAND & MEYER
Charter Medical Bldg.
Suite 1500
577 Mulberry Street
P.O. Box 5088
Macon, GA 32108
(912) 745-1625

CARTER G. PHILLIPS *
STEPHEN F. SMITH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

RICHARD B. NORTH, JR.
DONALD L. SWIFT III
NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.
First Union Plaza, Suite 1400
999 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 817-6000

Attorneys for Petitioner

* Counsel of Record

September 29, 1999

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether opinion testimony that does not meet the minimum standards of reliability announced in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), may nevertheless constitute sufficient evidence to sustain a necessary element of a cause of action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that its parent company is Norfolk Southern Corporation, and that its subsidiaries are the following:

CONSOLIDATED
(MORE THAN 50% OWNED) SUBSIDIARIES
OF NORFOLK SOUTHERN CORPORATION
AND STATES OF INCORPORATION
AS OF MARCH 1, 1999

Agency Media Services, Inc.
Atlantic Acquisition Corporation
Atlantic Investment Company
Norfolk Southern Properties, Inc.
Norfolk Southern Railway Company
Northmont Limited Partnership
NS Crown Services, Inc.
NS Fiber Optics, Inc.
NS Transportation Brokerage Corporation
Pocahontas Development Corporation
Pocahontas Land Corporation
TCS Leasing, Inc.
Thoroughbred Direct Intermodal Services, Inc.
Northern Horizon

Norfolk Southern Railway Company Subsidiaries

Airforce Pipeline, Inc.
Alabama Great Southern Railroad Company, The
Atlantic and East Carolina Railway Company
Camp Lejeune Railroad Company
Central of Georgia Railroad Company
Chesapeake Western Railway
Cincinnati, New Orleans and Texas Pacific Railway Company, The

Citico Realty Company
Georgia Southern and Florida Railway Company
High Point, Randleman, Asheboro and Southern Railroad Company
Interstate Railroad Company
Lamberts Point Barge Company, Inc.
Memphis and Charleston Railway Company
Mobile and Birmingham Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
Norfolk Southern International, Inc.
North Carolina Midland Railroad Company, The
Rail Investment Company
Shenandoah-Virginia Corporation
South Western Rail Road Company, The
Southern Rail Terminals, Inc.
Southern Rail Terminals of North Carolina, Inc.
Southern Region Coal Transport, Inc.
Southern Region Materials Supply, Inc.
Southern Region Motor Transport, Inc.
State University Railroad Company
Tennessee, Alabama & Georgia Railway Company
Tennessee Railway Company
Virginia and Southwestern Railway Company
Yadkin Railroad Company

Norfolk Southern Properties, Inc. Subsidiaries

Alexandria-Southern Properties, Inc.
Arrowood-Southern Company
Arrowood Southern Executive Park, Inc.
Carlyle CA Corporation
Caryle Development Corporation
Charlotte-Southern Corporation
Charlotte-Southern Hotel Corporation
Lambert's Point Docks, Incorporated

NKPI Management, Inc.
Nickel Plate Improvement Company, Inc., The
Norfolk Southern Industrial Development Corp.
Norfolk Southern Tower, L.L.C.
NS-Charlotte Tower Corporation
NS Gas Properties, Inc.
NS Gas Properties, II, Inc.
Sandusky Dock Corporation
Southern Region Industrial Realty, Inc.
Virginia Holding Corporation

Incorporated Subsidiaries Where Stock Not Yet Sold

Thoroughbred Technology and Communications

In addition, Norfolk Southern also owns:

Conrail Inc.
Consolidated Rail Corporation and its consolidated subsidiaries
CRR Holdings LLC
Delaware Otsego Corporation
DOCP Acquisition, LLC
Green Acquisition Corp.
New York Central Lines LLC
Pennsylvania Lines LLC and its subsidiaries

NORFOLK SOUTHERN CORPORATION

Affiliated and/or Leased Companies (50% or Less Owned) or partnerships

Ace Insurance Company
Algers, Winslow and Western Railway Company
Amtech Logistics Corporation
Augusta and Summerville Railroad Company
Beaver Street Tower Company

Belt Railway Company of Chicago, The
CK-Southern Associates
CK-Southern Associates #2 L.P.
CK-Southern Associates #3, L.L.C.
CNS Limited Partnership
Carlyle Towers, L.L.C.
Central Transfer Railway and Storage Company
Chatham Terminal Company
Chesapeake Crossing Seniors Community One, L.P.
Chesapeake Crossing Seniors Community Two, L.P.
Consolidated Rail Corporation
Conrail Inc.
CRR Holdings LLC
Delaware Otsego Corporation
DOCP Acquisition, LLC
Fiberow Partnership
1575 Eye Street Associates (Limited Partnership)
Florida East Coast Industries, Inc.
Gateway Institutional Tax Credit Fund Ltd.
Gilbert NS Lumber, LLC
Gilbert-PLC Lumber Co.
Gilbert Pocahontas, L.L.C.
Glenwood Square Shopping Center Associates, L.L.C.
Green Acquisition Corp.
Green Real Estate Company
High Point, Thomasville & Denton Railroad Company
Iowa Transfer Railway Company
Martiki-Pocahontas Partnership
Midland Corporate Tax Credit Ltd.
North Charleston Terminal Company
Pace Carbon Synfuels Investors, L.P.
Peoria and Pekin Union Railway Company
Pine Brook Center Limited Partnership
Railbox Company
Railgon Company

700 North Fairfax Street Limited Partnership
Southeast Banking Corporation
Stonebridge Manor Apartments, L.P.
TTX Company
Terminal Railroad Association of St. Louis
Three Commercial Place Associates
Triple Crown Services Company
Winston-Salem Southbound Railway Company
Woodstock & Blocton Railway Company

PARTIES

There are no parties to this action other than those listed in the caption of the case.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT REQUIRED BY RULE 29.6	ii
PARTIES	vi
TABLE OF AUTHORITIES	viii
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
Factual Background	2
Decision Of The Court Of Appeals	6
REASONS FOR GRANTING THE PETITION	7
I. FURTHER GUIDANCE FROM THIS COURT IS NECESSARY ON THE STANDARD OF PROOF REQUIRED IN ORDER TO PRESENT A JURY QUESTION UNDER FELA	7
A. The Circuits Are Divided On The Proper Standard Of Proof To Apply In FELA Cases	7
B. The State Court's Ruling That Unreliable Expert Testimony Can Support A Verdict Under FELA Is Contrary To Controlling Decisions Of This Court	9
II. WHETHER UNRELIABLE EXPERT TESTIMONY PROVIDES A SUFFICIENT BASIS FOR UPHOLDING A VERDICT UNDER FELA IS AN IMPORTANT ISSUE THAT SHOULD BE RESOLVED BY THIS COURT	13
CONCLUSION	19

TABLE OF AUTHORITIES

CASES — Page

Aparicio v. *Norfolk & W. Ry. Co.*, 84 F.3d 803 (6th Cir. 1996) 7, 8, 12
Brady v. *Southern Ry. Co.*, 320 U.S. 476 (1943) 9, 10, 15
Brown v. *CSX Transp., Inc.*, 18 F.3d 245 (4th Cir. 1994) 8
Claar v. *Burlington N. R.R. Co.*, 29 F.3d 499 (9th Cir. 1994) 17, 18
Consolidated Rail Corp. v. *Gottshall*, 512 U.S. 532 (1994) 18
Daubert v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) ..... *passim*
Gulf Offshore Co. v. *Mobil Oil Corp.*, 453 U.S. 473 (1981) 16
Harbin v. *Burlington N. R.R. Co.*, 921 F.2d 129 (7th Cir. 1990) 8, 10, 12
Hughes v. *International Diving & Consulting Servs., Inc.*, 68 F.3d 90 (5th Cir. 1995) 17
Kumho Tire Co. v. *Carmichael*, 119 S. Ct. 1167 (1999) 15, 18
Lavender v. *Kurn*, 327 U.S. 645 (1946) 11
Marlbed Murrelet v. *Babbitt*, 83 F.3d 1060 (9th Cir. 1996), *cert. denied*, 519 U.S. 1108 (1997) 16
Mendoza v. *Southern Pac. Transp. Co.*, 733 F.2d 631 (9th Cir. 1984) 8
Merrell Dow Pharms., Inc. v. *Havner*, 953 S.W.2d 706 (Tex. 1997), *cert. denied*, 118 S. Ct. 1799 (1998) 12, 17
Metro-North Commuter R.R. Co. v. *Buckley*, 521 U.S. 424 (1997) 16
Monessen Southwestern Ry. Co. v. *Morgan*, 486 U.S. 330 (1988) 15
Norfolk & W. Ry. Co. v. *Liepelt*, 444 U.S. 490 (1980) 19
Norfolk Southern Railway Co. v. *Baker*, 514 S.E.2d 448 (Ga. Ct. App. 1999) 1
Rogers v. *Missouri Pac. R.R. Co.*, 352 U.S. 500 (1957) 10, 11, 12
Sinkler v. *Missouri Pac. R.R. Co.*, 356 U.S. 326 (1958) 12

TABLE OF AUTHORITIES—Continued

Page

Smelser v. *Norfolk Southern Railway Co.*, 105 F.3d 299 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 67 (1997) 17, 18

Western & Atl. R.R. Co. v. *Hughes*, 278 U.S. 496 (1929) 10

Ybarra v. *Burlington N., Inc.*, 689 F.2d 147 (8th Cir. 1982) 8

FEDERAL STATUTES

28 U.S.C. § 1445(a) 17

45 U.S.C. § 23 (repealed 1994) 3

§ 51 2

§§ 51 *et seq.* 2

§ 56 17

IN THE

Supreme Court of the United States

No. 99-

NORFOLK SOUTHERN RAILWAY CO.,
Petitioner,

v.

LINDA BAKER, Individually and
as Personal Representative of
the Estate of Phil Baker,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Georgia

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests this Court to grant certiorari to review the decision of the Court of Appeals of Georgia in this case.

OPINIONS BELOW

The court of appeals' opinion is reported at 514 S.E.2d 448 (Ga. Ct. App. 1999) and is reproduced in the Appendix to this Petition for Certiorari ("Pet. App"), beginning at page 2a. The court's order denying rehearing can be found at Pet. App. 12a. The order of the Supreme Court of Georgia denying certiorari is unreported and appears at Pet. App. 1a. The unpublished orders of the Bibb County State Court denying petitioner's motion for judgment notwithstanding the verdict or a new trial and entering judgment on the verdict are reproduced at Pet. App. 13a-15a.

JURISDICTION

The court of appeals entered judgment on March 11, 1999, and denied petitioner's timely motion for reconsideration on March 30, 1999. The Supreme Court of Georgia denied certiorari on July 2, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT STATUTORY PROVISIONS

The Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.*, provides, in relevant part, that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." *Id.* § 51.

STATEMENT OF THE CASE

Factual Background

Petitioner Norfolk Southern Railway Company operates railroads as a common carrier throughout most of the eastern portion of the United States, including the State of Georgia. Respondent's decedent, Roger Phil Baker, served as a locomotive engineer for Norfolk Southern from 1973 until 1991. In that capacity, he operated diesel-powered trains from the crew-compartment of the locomotive, making daily runs between Macon and Valdosta, Georgia. During much of his adult life, Mr. Baker smoked cigarettes, drank heavily, and did woodworking—all activities known to cause cancer of the nasopharynx (the passageway connecting the nasal cavity with the throat). In 1991, he was diagnosed with that type of cancer, and he left his employment with Norfolk Southern on disability that same year.

On December 3, 1991, Mr. Baker filed this action against Norfolk Southern under FELA and the Locomotive Boiler Inspection Act, 45 U.S.C. § 23 (repealed 1994), in Georgia state court. He alleged that his cancer resulted from Norfolk Southern's failure to protect occupants of locomotive crew-compartments from exposure to diesel exhaust emitted from the trains. In his view, Norfolk Southern should have reversed the direction in which the locomotives operated so that the exhaust stack was behind, rather than in front of, the crew-compartment. Alternatively, he claimed that Norfolk Southern should have air-conditioned its locomotives so that the crew-compartments could be operated during warm weather without opening the windows because opening the windows would expose the occupants of the crew-compartments to diesel exhaust.[1] Mr. Baker's wife, respondent Linda Baker, assumed control of the litigation upon his death in 1991.

The key issue in the case was medical causation. Respondent claimed that Mr. Baker's cancer was caused by prolonged exposure to diesel exhaust. She attempted to establish this claim with testimony from Dr. Samuel Epstein that formaldehyde (a chemical found in cigarette smoke and diesel exhaust alike) may lead to cancer of the nasopharynx. Transcript ("T.") 734-35. Respondent's theory of causation, however, had several glaring evidentiary deficiencies.

First, Mr. Baker's treating oncologist, Dr. Mark Williams, testified that he could not identify the cause of

---

[1] On this same theory, he also asserted products liability claims against the manufacturers of the locomotives he operated during his tenure with Norfolk Southern: General Motors Corp. and General Electric Co. These defendants were subsequently dismissed from the case and are no longer parties to this action.

Mr. Baker's cancer. T.502-03. Indeed, Dr. Williams noted that *more than 50 percent* of the reported cases of nasopharyngeal cancer are attributable to unknown causes. *Id.* In contrast to Dr. Williams, Dr. Epstein was unfamiliar with the causes of nasopharyngeal cancer apart from his involvement in this single case. Specifically, Dr. Epstein has never published any articles or studies on that type of cancer or diesel exhaust (*id.* at 761), nor had he studied diesel exhaust prior to being retained by the Bakers (*id.* at 754-55). In fact, Dr. Epstein admitted that he had obtained *from the Bakers' attorneys* many of the studies he relied upon for the alleged carcinogenic qualities of formaldehyde. *Id.*

Second, the expert witnesses respondent named could not identify even a *single* epidemiological study linking diesel exhaust with nasopharyngeal cancer. T.777-78. Third, respondent's claim that formaldehyde in diesel exhaust is carcinogenic was squarely contradicted by a draft report of the U.S. Environmental Protection Agency, which concluded that such formaldehyde is *not* carcinogenic.[2] *Id.* at 812-18.

Norfolk Southern proferred evidence showing that Mr. Baker's cancer resulted from other causes unrelated to his job. Throughout his time with Norfolk Southern, he operated a woodworking shop in his spare time, making furniture and cabinetry. T.73, 121-23. This was significant, Norfolk Southern showed, because wood dust is a known

---

[2] Recognizing the deficiencies in their theory of causation, respondents attempted to have a toxicologist testify that diesel exhaust caused Mr. Baker's cancer. That testimony was so patently unreliable that the trial court excluded it from evidence. T.609-10. Equally unreliable was the Baker family doctor's opinion that diesel exhaust causes cancer of the nasopharynx, given his own admission that he had never treated a patient with, or mastered the medical literature on, that type of cancer. *Id.* at 520-21.

risk factor for malignancies of the nasal cavity. *Id.* at 965.

Also, Mr. Baker had smoked cigarettes and abused alcohol for decades. Having started smoking when he turned 15, he smoked one to two packs of cigarettes every day for almost two decades. T.103. He also drank heavily for 20 years. *Id.* at 71. Epidemiological studies link both cigarette smoking (*id.* at 791-821, 960, 964) and heavy drinking (*id.* at 964) to cancer of the nasopharynx. For this reason, even respondent's own expert had to concede that Mr. Baker's heavy smoking may have played a "contributory role" in his cancer. *Id.* at 745.

Based on the unreliability of respondent's expert testimony linking diesel exhaust with Mr. Baker's cancer, Norfolk Southern filed a motion in limine to exclude that testimony from evidence. The State Court of Bibb County never ruled on that motion or any of the parties' other motions in limine. At trial, with but one exception (see page 4 n.2, supra), the trial court denied Norfolk Southern's objections and admitted the proffered expert testimony into evidence. The case went to the jury, which returned a $5,744,225.50 verdict for respondent. Pet. App. 14a.

Norfolk Southern moved for judgment notwithstanding the verdict on the ground that the opinion testimony was so unreliable, measured by the standards of reliability announced in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as to provide insufficient evidence on which to find liability. In *Daubert*, this Court held that opinion testimony concerning scientific or other technical matters is unreliable (and hence inadmissible) unless it bears certain minimum indicia of reliability. *Id.* at 591-92. Among these indicia of reliability are whether an expert's theory or technique "has been subjected to peer review and publication" (*id.* at 593) or achieved

"[w]idespread acceptance" in the relevant discipline (*id.* at 594). Norfolk Southern demonstrated that the opinion testimony introduced by respondent—which, as mentioned above, was flatly contradicted by scientific reports and totally unsupported by the medical literature—lacked the indicia of reliability deemed essential in *Daubert*.

Without questioning Norfolk Southern's showing in this regard, the trial court denied that motion and entered final judgment on the verdict. Pet. App. 13a. Norfolk Southern appealed.

Decision Of The Court Of Appeals

In a published opinion, the Court of Appeals of Georgia affirmed the trial court's rulings concerning the sufficiency of the evidence to support a verdict under FELA. Pet. App. 2a.

Like the trial court, the court of appeals did not even attempt to defend the reliability of the Bakers' expert testimony under the *Daubert* standards or, for that matter, any other standards. Instead, the court brushed aside *Daubert* altogether, stating that "*Daubert* involves the application of the Federal Rule of Evidence 702, which has not been adopted in Georgia." Pet. App. 5a. Unlike the Federal Rules, the court of appeals noted, Georgia law declares that testimony by properly qualified experts " 'shall always be admissible,' " with all questions as to the reliability of such testimony going only to the "weight and credibility of the testimony." *Id.* at 5a-6a (quoting O.C.Ga. § 24-9-67).

After summarizing Dr. Epstein's testimony in isolation, the court concluded: "This testimony is sufficient to authorize the jury's finding that diesel exhaust caused, or played a role in causing[,] the decedent's fatal nasopharyngeal cancer." Pet. App. 7a. On this basis, the

court rejected Norfolk Southern's challenge to the sufficiency of the evidence to support a finding of liability under FELA.[3]

The Supreme Court of Georgia denied certiorari. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

This case presents an issue of increasing importance to state court litigation on federal causes of action: whether state courts can rely upon expert testimony that fails to meet the minimum standards of reliability enunciated in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591-95 (1993), in deciding the sufficiency of the evidence to support a verdict. This issue implicates an acknowledged split among the Circuits over the standard of proof that a FELA plaintiff must meet in order to avoid judgment as a matter of law in favor of the railroad. See generally *Aparicio* v. *Norfolk & W. Ry. Co.*, 84 F.3d 803, 808-10 (6th Cir. 1996) (describing the split). In addition, the court below resolved the question presented in a manner that conflicts with controlling decisions of this Court and will expand the scope of liability under FELA far beyond that intended by Congress. The petition for certiorari, therefore, should be granted.

I. FURTHER GUIDANCE FROM THIS COURT IS NECESSARY ON THE STANDARD OF PROOF REQUIRED IN ORDER TO PRESENT A JURY QUESTION UNDER FELA.

A. The Circuits Are Divided On The Proper Standard Of Proof To Apply In FELA Cases.

This case presents the Court with an opportunity to provide needed guidance on the amount of evidence that

---

[3] Although the court thus affirmed the finding of liability, it did vacate the damages award, based on instructional error, and remanded for a new trial on damages. Pet. App. 10a-11a.

is necessary in order for a FELA plaintiff to survive a motion for judgment as a matter of law, a question that has divided the Circuits. As one court of appeals recently noted, "courts have struggled with the question of whether a Federal Employers' Liability Act plaintiff need present only *slight* evidence or a *scintilla* of evidence as to each element of his or her claim in order to withstand a motion for judgment as a matter of law, or whether a plaintiff must present something more than that." *Aparicio* v. *Norfolk & W. Ry. Co.*, 84 F.3d 803, 808 (6th Cir. 1996).

In *Harbin* v. *Burlington N. R.R. Co.*, 921 F.2d 129, 130-32 (7th Cir. 1990), the Seventh Circuit adopted the more lenient standard—namely, that *any* evidence, however slight, defeats a motion for judgment as a matter of law. The *Harbin* court ruled that a triable issue of liability is presented "when there is even slight evidence of negligence." *Id.* at 131. Similarly, the Ninth Circuit has ruled that only "slight evidence" is sufficient to support a judgment under FELA. *Mendoza* v. *Southern Pac. Transp. Co.*, 733 F.2d 631, 633 (9th Cir. 1984); see also, *e.g.*, *Ybarra* v. *Burlington N., Inc.*, 689 F.2d 147, 149 (8th Cir. 1982) (minimal evidence sufficient).

Other Circuits, however, have rejected that approach and demanded a more substantial showing by the plaintiff. For example, the Sixth Circuit in *Aparicio* expressly rejected *Harbin*'s "scintilla of evidence" rule, holding instead that "more than a scintilla of evidence [is required] in order to create a jury question on the issue of employer liability." 84 F.3d at 810. The Fourth Circuit follows the same rule. See *Brown* v. *CSX Transp. Inc.*, 18 F.3d 245, 248 (4th Cir. 1994); see generally *Aparicio*, 84 F.3d at 808-10 (explaining this split of authority).

In the ruling below, the Court of Appeals of Georgia essentially came down on the side of *Harbin* and *Mendoza*. The state court upheld the verdict based solely on Dr. Epstein's bare statement that diesel exhaust caused Mr. Baker's cancer. That statement, by itself, was deemed adequate to support the verdict. Pet. App. 6a-7a. By not even *inquiring* whether or not that statement was reliable in light of the current state of medical knowledge, the published epidemiological studies, and other pertinent considerations (*id.* at 7a), the court necessarily concluded that the nature and quantum of evidence is irrelevant for sufficiency purposes and that all that matters is that there was a *scintilla* of evidence pointing to liability. This Court should take this opportunity to resolve this fundamental question over the proper standard of proof in FELA cases.

B. The State Court's Ruling That Unreliable Expert Testimony Can Support A Verdict Under FELA Is Contrary To Controlling Decisions Of This Court.

In addition to worsening a conflict of authority at the appellate level, the state court's holding that a mere scintilla of evidence can provide an adequate evidentiary basis for a verdict under FELA contravenes controlling decisions of this Court. This provides yet another reason for granting certiorari here.

1. This Court has held, on more than one occasion, that in FELA cases, there is no triable issue of liability where only a scintilla of evidence is adduced by the plaintiff. In *Brady* v. *Southern Railway Co.*, 320 U.S. 476 (1943), this Court held:

> *The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of*

> *the trier of fact*—in this case, the jury. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.

Id. at 479-80 (emphasis added) (citations omitted). Other cases from this Court support this view. See, *e.g.*, *Western & Atl. R.R. Co.* v. *Hughes*, 278 U.S. 496, 498 (1929).

The court below disregarded this critical holding from *Brady*, ostensibly deriving support for its scintilla approach (as did the Seventh Circuit in *Harbin*, 921 F.2d at 131) from the post-*Brady* decision of this Court in *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957). See Pet. App. 7a (following Georgia decisions applying *Rogers*). In *Rogers*, this Court held that a finding of liability under FELA should be sustained if "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 506. Properly understood, this statement does not overrule, *sub silentio*, the Court's prior holdings that, even under FELA, a mere scintilla of evidence cannot save a verdict.

First of all, read in context the statement from *Rogers* was merely intended to refute the notion that "a jury question [is] dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury." *Id.* Rejecting this "language of proximate causation" as contrary to the terms and hu-

manitarian purposes of FELA (*id.*), the Court in *Rogers* merely held that employer negligence only needs to be a contributing, as opposed to a proximate, cause of injury:

> It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the [injurious] result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. . . . The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or *in part*" to its negligence.

Id. at 506-07 (quoting 45 U.S.C. § 51) (footnotes omitted).

Moreover, even taken out of context, the *Rogers* standard does not support the state court's view that the reliability of expert testimony does not factor into sufficiency review. That standard itself requires more than just "evidence," as the court below would have it—it requires evidence that "justif[ies] *with reason*" a finding of liability. *Id.* at 506 (emphasis added); see also *Lavender* v. *Kurn*, 327 U.S. 645, 654 (1946) (ruling that "*probative* facts" are necessary to support a verdict under FELA (emphasis added)). The "with reason" qualification demands proof that would be *reasonable* to credit.

As will become clear below, the whole point of *Daubert* is that opinion evidence is utterly unreliable—and thus may not reasonably be relied upon by the finder of fact—unless it bears certain minimum standards of reliability, as respondent's expert testimony here indisputably does not. See 509 U.S. 579, 592 (1993). This is why the "same factors" applied in *Daubert* also apply in determining whether expert testimony is sufficient to support a

finding by the trier of fact. *Merrell Dow Pharms., Inc.* v. *Havner*, 953 S.W.2d 706, 714 (Tex. 1997), *cert. denied*, 118 S. Ct. 1799 (1998). It simply makes no sense to hold, as the court of appeals did here, that expert testimony lacking any indicia of reliability can nonetheless "justify with reason" a verdict under FELA. *Rogers*, 352 U.S. at 506. Consequently, both as a matter of law and logic, the court below should have determined the reliability of the expert testimony proffered by respondent as part of its review of the sufficiency of the evidence adduced at trial.

2. Even apart from the merits of this issue, this is an area where further guidance from this Court is necessary to the proper administration of FELA. As mentioned above, there is a split between the Circuits on the proper standard for determining the sufficiency of a verdict under FELA. This split hinges on the relationship between this Court's decisions in *Brady* and *Rogers*. See generally *Aparicio*, 84 F.3d at 808-09.

Aparicio and other Circuits have ruled, correctly, that "the 'more than a scintilla' rule of *Brady* is still the standard governing the quantum of evidence a plaintiff in a Federal Employers' Liability Act case must present." *Id.* at 810. This view, however, has not been universal. In his dissent in *Sinkler* v. *Missouri Pacific Railroad Co.*, 356 U.S. 326 (1958), for example, Justice Harlan lamented that "with *Rogers* . . . the Court in effect established a 'scintilla' rule in [FELA] cases for judging the sufficiency of the evidence on the issue of 'causation.'" *Id.* at 332. The Seventh Circuit adopted this same reading of *Rogers* in *Harbin* and therefore adopted the same "scintilla" rule previously rejected in *Brady*. 921 F.2d at 131 (following *Rogers* v. *Missouri Pac. R.R. Co.*, 352 U.S. 500, 506 (1958)). At a minimum, the Court

should grant certiorari to clarify the relationship between the standards announced in *Rogers* and *Brady*.

II. WHETHER UNRELIABLE EXPERT TESTIMONY PROVIDES A SUFFICIENT BASIS FOR UPHOLDING A VERDICT UNDER FELA IS AN IMPORTANT ISSUE THAT SHOULD BE RESOLVED BY THIS COURT.

The court of appeals erred in dismissing *Daubert* as inapplicable in cases brought in state court. *Daubert* provides more than just an interpretation of the Federal Rules of Evidence; it also establishes baseline standards for considering opinion evidence to be reliable and therefore probative. These standards should inform the federal common law that defines the quantum of proof required for recovery under FELA.

1. A full discussion of *Daubert* is essential to a proper understanding of the nature and importance of the question presented.

In *Daubert*, the Court was presented with a medical causation question similar to that presented in this case—whether or not the prescription drug Bendectin causes birth defects in humans. The Court first addressed the question whether the Federal Rules of Evidence superseded the common law requirement that to be admissible in federal court, scientific testimony must be based on methodologies or techniques that command "general acceptance" in the relevant discipline. The Court ruled that the rigid common law test had in fact been superseded. 509 U.S. 579, 588-89 (1993). Nevertheless, *Daubert* stressed that trial judges "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589.

The Court's explication of the standards for determining the reliability of expert testimony is pertinent here.

This determination "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. To be scientifically valid, the Court ruled, "an inference or assertion must be derived by the scientific method" *and* "supported by appropriate validation—*i.e.*, 'good grounds,' based on what is known." *Id.* at 590.

The Court then identified certain key factors bearing on the scientific validity of scientific evidence or modes of analysis under Rule 702. *First*, courts must consider "whether a theory or technique . . . can be (and has been) tested." *Id.* at 593. Any methodology that is truly "scientific," the Court explained, will be capable of being tested or proven false. *Id. Second*, courts should decide "whether the theory or technique has been subjected to peer review and publication." *Id.* Exposure to the rigors of the scientific review process is a "component of 'good science' " because it "increases the likelihood that substantive flaws in methodology will be detected." *Id.*

Third, "the known or potential rate of error [of a particular scientific technique], and the existence and maintenance of standards controlling the technique's operation" are relevant considerations. *Id.* at 594 (citation omitted). Compliance with such standards is an indicator of reliability. *Id. Fourth*, courts should consider the extent to which a particular theory or analytical method has achieved "general acceptance" in the scientific community. *Id.* This is so because " 'a known technique which has been able to attract only minimal support within the community' may properly be viewed with skepticism." *Id.* (citation omitted) (quoting *United States* v. *Downing*, 753 F.2d 1224, 1238 (3d Cir. 1985)).

The Court emphasized the importance of conducting a rigorous analysis of the reliability of expert testimony. "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Id.* at 595 (internal quotation marks omitted). This possibility of error, while tolerable in science because scientists can expose and correct errors over time, is intolerable in the litigation context: "Conjectures that are probably wrong are of little use . . . in the project of reaching quick, final, and binding legal judgment—often of great consequence —about a particular set of events in the past." *Id.* at 597. Accordingly, *Daubert* charged courts with carefully scrutinizing proposed scientific testimony or methodologies for scientific validity and reliability before giving such testimony any credence in litigation.[4]

2. The court of appeals refused to evaluate the expert testimony advanced at trial by respondent because "*Daubert* involves the application of the Federal Rule of Evidence 702, which has not been adopted in Georgia." Pet. App. 5a. This truism simply misses the point.

Although state courts are free, as a general matter, to apply their own procedural rules in adjudicating federal causes of action, it is clear that "State courts are required to apply federal substantive law in adjudicating FELA claims." *Monessen Southwestern Ry. Co.* v. *Morgan*, 486 U.S. 330, 335 (1988). It is equally clear that the sufficiency of the evidence to support a verdict under FELA is a question of substance governed by federal law. See *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 479 (1943). FELA provides one of the rare instances where courts are

---

[4] In *Kumho Tire Co.* v. *Carmichael*, 119 S. Ct. 1167 (1999), the Court clarified that the *Daubert* standard "applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowldge." *Id.* at 1171 (citing Fed. R. Evid. 702).

obliged to fashion a body of "federal common-law rule[s]." *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 486 (1981); see also *Metro-North Commuter R.R. Co.* v. *Buckley*, 521 U.S. 424, 429 (1997) (courts' "duty 'in interpreting FELA . . . is to develop a federal common law of negligence [under FELA] informed by reference to the evolving common law' ") (quoting *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 558 (1994) (Souter, J., concurring) (omission in original)).

As a result, the relevant question is not whether the court below was bound by *Daubert*, as a rule of evidence. Rather, the pertinent question is whether *Daubert*'s common-law rules filling the interstices of Rule 702 should inform the substance of federal law concerning what type of evidence is sufficient to support a verdict under FELA. The answer to that question is "yes."

Daubert held that the minimum standards of reliability it articulated are necessary in order for expert testimony to "assist the trier of fact to understand or determine a fact in issue." 509 U.S. at 592. If expert testimony that fails to satisfy the *Daubert* standards of reliability cannot possibly "assist" the trier of fact, it follows, *a fortiori*, that the trier of fact cannot base a finding of liability on such testimony.[5] Therefore, "evidence which is unreliable [under *Daubert*] is *necessarily* insufficient" as a matter of law. *Marlbed Murrelet* v. *Babbitt*, 83 F.3d 1060, 1066 (9th Cir. 1996) (emphasis added), *cert. denied*, 519 U.S. 1108 (1997).

---

[5] This point is bolstered by *Daubert*'s admonition that even testimony which *satisfies Daubert*'s minimum standards of reliability nevertheless can be too "shaky" to "allow a reasonable juror to conclude that the position [for which the testimony was offered] more likely than not is true." 509 U.S. 579, 596 (1993). In that circumstance, the Court noted, "the court remains free to direct a judgment and likewise to grant summary judgment." *Id.* (citations omitted).

Not surprisingly, therefore, courts have looked to *Daubert* in determining sufficiency-of-evidence questions in FELA actions and other types of cases. See, *e.g.*, *Smelser* v. *Norfolk Southern Railway Co.*, 105 F.3d 299, 306 (6th Cir. 1997) (reversing FELA verdict), *cert. denied*, 118 S. Ct. 67 (1997); *Hughes* v. *International Diving & Consulting Servs., Inc.*, 68 F.3d 90, 93 (5th Cir. 1995) (in deciding sufficiency of evidence under the Jones Act, which is construed *in pari materia* with FELA, "we consider only competent evidence and, therefore, disregard" testimony violative of *Daubert*); *Claar* v. *Burlington N. R.R. Co.*, 29 F.3d 499, 504 (9th Cir. 1994) (affirming summary judgment against FELA plaintiff because his testimony on causation failed to meet *Daubert* standards); *Merrell Dow Pharms., Inc.* v. *Havner*, 953 S.W.2d 706, 714 (Tex. 1997) (holding that the "same factors" applied in *Daubert* apply in determining the sufficiency of a finding premised on expert testimony), *cert. denied*, 118 S. Ct. 1799 (1998); see generally *id.* at 713 ("There are many decisions outside the Bendectin litigation that have examined the reliability of scientific evidence in a review of the legal sufficiency of the evidence.") (citing cases). The court below erred by not doing likewise.

Although this issue of the relevance of *Daubert* in determining questions of evidentiary sufficiency can arise under *any* federal cause of action, it is of particular importance under FELA. This is so because defendants are specifically prohibited from removing FELA actions brought in state court to federal court. See 28 U.S.C. § 1445(a). This creates an opportunity for rank forum-shopping between state and federal courts by FELA plaintiffs—an opportunity made even more realistic by the extremely liberal venue rules that apply in FELA cases, which permit suit against a railroad anywhere it does business. See 45 U.S.C. § 56.

If, as the state court essentially ruled below, the federal common law defining FELA liability does not incorporate the *Daubert* standards of reliability, plaintiffs will be able to roll the dice in state court in Georgia and other states having no counterpart to Rule 702 with cases premised upon "expertise that is *fausse* and science that is junky." *Kumho Tire Co.* v. *Carmichael*, 119 S. Ct. 1167, 1179 (1999) (Scalia, J., concurring). Such cases would be bounced out of federal court, even apart from the inadmissibility of unreliable expert testimony under the Federal Rules of Evidence, because the federal courts correctly look to the *Daubert* standards in determining the sufficiency of the evidence in FELA cases. See, *e.g.*, *Smelser*, 105 F.3d at 306; *Claar*, 29 F.3d at 504. The ruling below, however, paves the way for cases based on "faus expertise" and "junk science" to be decided by juries, free from *any* meaningful review for sufficiency of the evidence, in the courts of Georgia and other states which have not adopted *Daubert* as a test of the admissibility of expert testimony.

By thus opening the door to recovery by plaintiffs lacking reliable expert testimony supporting their claims, the decision below undermines the intended operation of FELA in a number of important respects. *First*, the court of appeals' ruling goes a long way toward transforming FELA into a strict liability statute. This result is flatly contrary to this Court's consistent recognition that "FELA 'does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.' " *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543 (1994) (quoting *Ellis* v. *Union Pac. R.R. Co.*, 329 U.S. 649, 653 (1947)).

Second, by making the sufficiency of evidence under FELA depend on the forum in which the case is brought,

the state court below defeated one of the key "purposes" of FELA, which was "to 'create uniformity throughout the Union' with respect to railroads' financial responsibility for injuries to their employees." *Norfolk & W. Ry. Co.* v. *Liepelt*, 444 U.S. 490, 493 n.5 (1980) (quoting H.R. Rep. No. 60-1386, at 3 (1908)). These untoward results would not have occurred had the court of appeals required plaintiffs to present reliable expert testimony that employer negligence caused him injury in order to satisfy the relaxed burden of proof applicable in FELA cases. A writ of certiorari, therefore, is necessary in this case not only to resolve decisional conflicts and uncertainty, but also to restore the proper administration of FELA.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

MARK E. TOTH
HALL, BLOCH, GARLAND & MEYER
Charter Medical Bldg.
Suite 1500
577 Mulberry Street
P.O. Box 5088
Macon, GA 32108
(912) 745-1625

RICHARD B. NORTH, JR.
DONALD L. SWIFT III
NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.
First Union Plaza, Suite 1400
999 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 817-6000

CARTER G. PHILLIPS *
STEPHEN F. SMITH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Attorneys for Petitioner

* Counsel of Record

September 29, 1999

APPENDICES

APPENDIX A

SUPREME COURT
OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

Date: July 02, 1999

Mark Edward Toth
HALL, BLOCH, GARLAND & MEYER
P.O. Box 5088
Macon, GA 312085088

Case No. S99C1077

NORFOLK SOUTHERN RAILWAY COMPANY

v.

LINDA BAKER *et al.*

Court of Appeals Case No. A98A1854

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,
SHERIE M. WELCH
Clerk

APPENDIX B

March 11, 1999

IN THE COURT OF APPEALS OF GEORGIA
FIRST DIVISION

McMURRAY, P. J.,
BLACKBURN and ELDRIDGE, JJ.

A98A1854

NORFOLK SOUTHERN RAILWAY COMPANY

v.

BAKER *et al.*

MC-099

McMURRAY, Presiding Judge.

After working on the railroad as a locomotive engineer for 18 years, Phil Baker ("the decedent") was stricken with nasopharyngeal cancer and died.[1] The decedent's widow, Linda W. Baker, brought an action, individually and as representative of her husband's estate, against the decedent's former employer, Norfolk Southern Railway Company ("Norfolk Southern"), alleging the decedent's

[1] The nasopharynx is at the back of the mouth, just above the soft pallet, next to the tonsils.

fatal cancer was caused by prolonged exposure to exhaust from Norfolk Southern's diesel powered locomotives. Ms. Baker charged Norfolk Southern with failing to provide the decedent with a safe place to work in violation of the Federal Employers Liability Act ("FELA"), 45 USC § 51 et seq., and with violating the Locomotive Boiler Inspection Act's ("LBIA"), 45 USC § 23, regulation that products of combustion shall be released outside locomotive crew-cabins, 49 CFR § 229.43(a).[2]

Norfolk Southern denied liability and the case was tried before a jury. The jury returned a $5,744,225.50 verdict for Ms. Baker and the decedent's estate. The evidence adduced at trial, construed to uphold this verdict (*Southeastern Security Insurance Company v. Hotle*, 222 Ga. App. 161, 162 (1) (473 SE2d 256)), reveals that the decedent, while working in the crew-cabin areas of Norfolk Southern's locomotives, was exposed to high levels of diesel exhaust—six days a week, four to 12 hours a day; that this exposure, according to expert testimony, ". . . incriminates diesel exhaust as the cause of [the decedent's] fatal nasopharyngeal cancer[;]" that Norfolk Southern knew, since at least 1985, that its locomotive crews were reporting medical problems and other difficulties due to excessive diesel exhaust in their working cabins and that Norfolk Southern did not remedy the situation before the decedent's death in 1991.

The decedent testified posthumously, during a videotaped deposition, that "black smoke" routinely flooded the crew-cabs of the Norfolk Southern diesel powered

---

[2] This regulation provides as follows: "Products of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions."

locomotives he operated; that this smoke was from the lomocotives' centrally mounted exhaust stacks; that he was exposed to such exhaust ". . . to a degree at all times . . ." during his four to 12 hour daily runs between Macon, Georgia and Valdosta, Georgia, and that his exposure to diesel exhaust was greatest during warm weather (at least 6 months per year) because Norfolk Southern did not air condition its locomotives' crew-cabins. The decedent explained that the only way to cool the crew-cabin on a Norfolk Southern locomotive, which was probably ". . . twenty to thirty degrees warmer . . . than . . . outside, . . ." was to open the cabin's tandem windows, but that this procedure allowed "black [diesel] smoke" to flood the crew-cabin from the locomotive's cabin-forward exhaust stack.

Another Norfolk Southern locomotive engineer, James Robert Sexton, testified that he informed Norfolk Southern officials in 1985 that diesel exhaust was causing medical problems for Norfolk Southern's lomomotive crews. Mr. Sexton also testified that he advised his Norfolk Southern supervisors that most of the exhaust was entering the crews' work areas because Norfolk Southern's bidirectional-locomotives were operating in the direction which placed the locomotives' crew-cabins aft of the diesel exhaust stacks and that this problem could be improved by operating the locomotives in the direction which placed the crew-cabins forward of the diesel exhaust stacks. Mr. Sexton's testimony reveals that he also suggested to his Norfolk Southern supervisors that air conditioning its locomotives [sic] crew-cabins would improve the diesel exhaust problem, but that Norfolk Southern did not adopt his recommendations or any effective policy for reducing the diesel exhaust problem in its locomotives' crew-cabins.

Luther J. Sibley testified that he worked with the decedent during his career as a Norfolk Southern conductor;

that his exposure and the decedent's exposure to diesel exhaust was so heavy that, ". . . winter or summer, . . . the fumes that would come in would get in your clothing, would get in your hair, would get in—you breathe it, you could taste it, and [that] this was a day-in and day-out situation." Mr. Sibley explained that, before runs, he often asked to configure the locomotives he was assigned to operate so that the locomotives' crew-cabins would be in front of the diesel exhaust stacks, but that his Norfolk Southern supervisor usually responded by saying: " 'Well, we're not going to alter the engines just to accommodate you so that you all won't have fumes coming in the engine cab. The engines come in here on a certain consist [(configuration), and] that's how we're going to run them. You be satisfied with it.' "

This appeal followed the trial court's denial of Norfolk Southern's motion for new trial and motion for judgment notwithstanding the verdict. *Held*:

1. Citing *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (113 SC 2786, 125 LE2d 469), Norfolk Southern contends the trial court erred in denying its motion for directed verdict because Ms. Baker's medical expert did not offer a probable scientific basis for his opinion that diesel exhaust caused or contributed to the decedent's fatal nasopharyngeal cancer.

"We first note that *Daubert* involves the application of Federal Rule of Evidence 702, which has not been adopted in Georgia. The applicable law in Georgia is OCGA § 24-9-67, which provides: 'the opinions of experts on any question of science, skill, trade or like questions shall always be admissible; and such opinions may be given on the facts as proved by other witnesses.' Provided an expert witness is properly qualified in the field in which he offers testimony, *Chandler Exterminators v. Morris,* 262

Ga. 257 (416 SE2d 277) (1992), and the facts relied upon are within the bounds of the evidence, whether there is sufficient knowledge upon which to base an opinion or whether it is based upon hearsay goes to the weight and credibility of the testimony, not its admissibility. *King v. Browning*, 246 Ga. 46, 47 (1) (268 SE2d 653) (1980); *Jones v. Ray*, 159 Ga. App. 734, 736 (4) (285 SE2d 42) (1981)." *Orkin Exterminating Company, Inc. v. McIntosh*, 215 Ga. App. 587, 591 (4), 592 (452 SE2d 159).

In the case sub judice, the unchallenged testimony of Dr. Samuel S. Epstein, Professor of Occupational and Environmental Health at the School of Public Health in Chicago, Illinois, qualified him as an expert in chemistry, pathology, internal medicine, toxicology, cancer causation and the carcinogenic properties of diesel exhaust. After opining that ". . . the preponderance of evidence clearly incriminates diesel exhaust as the cause of [the decedent's] fatal nasopharyngeal cancer, . . ." Dr. Epstein explained that he based his opinion on estimates of the decedent's exposure to diesel exhaust (posed in a factually supported hypothetical question), his understanding of diesel exhaust chemistry and his knowledge and examination of studies linking diesel exhaust to cancer in laboratory animals and humans. Dr. Epstein explained that diesel exhaust contains many carcinogenic elements—including high levels of formaldehyde; that formaldehyde causes nasal cancer in laboratory animals and that formaldehyde has been shown to cause the type of cancer that was discovered in the decedent's nasopharynx—"squamous cancer." Dr. Epstein further explained that diesel exhaust, while generally carcinogenic, poses a specific risk for nasopharyngeal cancer because it contains soot particles which absorb the exhaust's carcinogenic gases and then, when inhaled, accumulates these concentrated carcinogens in the naso-

pharynx. This testimony is sufficient to authorize the jury's finding that diesel exhaust caused, or played a role in causing the decedent's fatal nasopharyngeal cancer. " 'Under (FELA) the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.' (Citations and punctuation omitted.) *CSX Transp., Inc. v. Snead*, 219 Ga. App. 491, 495 (2) (465 SE2d 690) (1995)." *Thomas v. CSX Transportation, Inc.*, 233 Ga. App. 178, 180 (503 SE2d 662).

The case sub judice is not controlled by *Motorola, Inc. v. Ward*, 223 Ga. App. 678, 679 (478 Ga. App. 465) (physical precedent only), and *Jordan v. Georgia Power Company*, 219 Ga. App. 690, 694 (2) (466 SE2d 601), where this Court held that there was insufficient statistical or scientific data to support expert opinions that electromagnetic fields cause cancer. Unlike the case sub judice, *Motorola* and *Jordan* are actions that were not subject to the lesser quantum of evidence required to establish liability in FELA cases. See *Thomas v. CSX Transportation, Inc.*, 233 Ga. App. 178, 180, supra. See also *Harbin v. Burlington Northern Railroad Company*, 921 F2d 129, 130-131 (7th Cir. 1990) (quantum of evidence required to establish liability in an FELA case is much less than in an ordinary negligence case). But even assuming the contrary, we find Dr. Epstein's explanation for his opinion regarding the cause of the decedent's cancer sufficient to demonstrate a "reasonable probability" of a causal connection between the decedent's exposure to diesel exhaust and his nasopharyngeal cancer. See *Holley v. Smallwood*, 174 Ga. App. 365, 366 (330 SE2d 136); *Maurer v. Chyatte*, 173 Ga. App. 343 (3), 344-345 (326 SE2d 543). The trial court, therefore, did not err in allowing

the jury to resolve the issue of causation and in denying Norfolk Southern's motion for directed verdict or for a new trial.

2. Norfolk Southern's third enumeration of error contends that it ". . . was entitled to a directed verdict on [Ms. Baker's] Locomotive Boiler Inspection Act claim, because the evidence failed to demonstrate that the level of diesel emissions in locomotive cabs exceeded the levels permitted by the Federal Railroad Administration [("FRA")]." Although Norfolk Southern supports this assertion by referring to an FRA opinion letter, Defendant's Exhibit 682, that purportedly defines LBIA's tolerance for certain amounts of diesel exhaust in locomotive crew-cabins, Norfolk Southern does not show where this letter can be found in the case sub judice's 23 volume record as required by Rule 27 (a) of the Court of Appeals of the State of Georgia. Moreover, our examination of the trial transcript and the trial transcript's exhibit index indicates that Defendant's Exhibit 682 was discussed and identified at trial, but not proffered into evidence. Under such circumstances, there is no basis for considering Norfolk Southern's assertion that LBIA's tolerance for diesel exhaust in locomotive crew-cabins is anything other than the apparently clear and unambiguous standard prescribed in 49 CFR 229.43 (a). That is, that "[p]roducts of combusion shall be released entirely outside the cab and other compartments [of locomotives and that locomotive exhaust] stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions." From this perspective, we find the decedent's testimony and the testimony of his conductor, Luther J. Sibley, regarding the decedent's daily exposure to diesel exhaust, sufficient to authorize the jury's consideration of Norfolk Southern's liability for failing to comply with 49 USC § 229.43 (a). See *Lilly v. Grand*

Truck Western Railroad, 317 U.S. 481, 485 (63 SC 347, 87 LE 411).

The trial court did not err in denying Norfolk Southern's motion for directed verdict as to Ms. Baker's strict liability claim under LBIA.

3. Because there is nothing to refute Ms. Baker's evidence that Norfolk Southern violated LBIA's regulation against diesel exhaust in its locomotives' crew-cabins and since there is proof that this violation contributed to the decedent's death, the trial court did not err in refusing to give Norfolk Southern's requested jury charge on contributory negligence. In FELA cases based on a LBIA violation, contributory negligence cannot be considered in mitigation of damages. See 45 USC § 53; *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 506 (77 SC 808, 1 LE2d 493); *Western & Atlantic Railroad v. Townsend*, 36 Ga. App. 70, 74 (6) (135 SE 439), and *Baker v. CSX Transportation, Inc.*, 581 NE2d 770, 781-782 (1991).

Hickox v. Seaboard System Railroad, Inc., 183 Ga. App. 330 (358 SE2d 889), is not controlling because, unlike the case sub judice, the injured railroad worker in *Hickox* did not base his FELA action, in whole or in part, on a statutory or regulatory violation that was enacted for the safety of employees.

4. Citing *Key v. Norfolk Southern Railway Company*, 228 Ga. App. 305 (491 SE2d 511), Norfolk Southern contends it was entitled to a directed verdict based on Ms. Baker's proof that Norfolk Southern's locomotives were not air conditioned. Specifically, Norfolk Southern reasons that this proof converted Ms. Baker's action into a design defect case which is preempted by LBIA. We do not agree.

In *Key*, a railway worker claimed that he was injured by defectively designed steps on his railway employer's locomotive. Because it was undisputed that these steps complied with LBIA's design regulations, this Court held that LBIA preempted the injured employee's common-law design defect claim and authorized summary judgment for the railway employer. This Court explained that any evidence of a design defect beyond the requirements of LBIA's regulations was immaterial. *Key v. Norfolk Southern Railway Company*, 228 Ga. App. 305, supra. The case sub judice is distinguishable because, even though LBIA's regulations may not have required air conditioners on Norfolk Southern's locomotives, proof that Norfolk Southern refused, unlike other railway operators, to air condition its locomotives was immaterial to Ms. Baker's FELA claim that Norfolk Southern did not take reasonable steps to provide a safe workplace for the decedent.

5. Norfolk Southern contends the trial court erred in charging the jury that the decedent's estate would be entitled to recover the full value of the decedent's life. We are compelled to agree.

In *Atlantic Coast Line Railroad Company v. Solomon*, 37 Ga. App. 737, 738 (2) (141 SE 917), this Court held that a new trial was required because the trial court, in a FELA case, erroneously ". . . charged the Georgia rule as to the measure of damages, under which the plaintiff would be entitled to recover the full value of the life of the decedent. . . ." Id. at 738 (2), supra. "Damages recoverable in an FELA action are compensatory only. *Seaboard System Railroad v. Taylor*, 176 Ga. App. 847 (2) (338 SE2d 23) (1985). The FELA plaintiff can recover special damages for past and future lost wages and medical expenses, as well as general damages for

pain and suffering. See, e.g., *CSX Transp. v. Darling*, 189 Ga. App. 719 (377 SE2d 217) (1988); *Nairn v. Nat. R. Passenger Corp.*, 837 F2d 565 (2nd Cir. 1988)." *Central of Georgia Railroad Company v. Swindle*, 260 Ga. 685, 686 (398 SE2d 365).

The trial court's erroneous jury instruction as to the right to recover the full value of the decedent's life, as well as the jury's general verdict, requires this Court to reverse and remand the case sub judice for a new trial as to damages only. And contrary to Ms. Baker's assertions that four juror affidavits fairly explain the jury's verdict, we find that the trial court's erroneous instruction cannot be construed as harmless because the proper measure of damages in any FELA action is inseparably connected with the right of action. *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330, (108 SC 1837, 100 LE2d 349). Norfolk Southern did not specifically complain, and we do not reach any other aspect of the trial court's damages charge.

Judgment affirmed in part and reversed in part and remanded with direction. Blackburn and Eldridge, JJ., concur.

APPENDIX C

ATLANTA, March 30, 1999

COURT OF APPEALS
OF THE STATE OF GEORGIA

A98A1854

NORFOLK SOUTHERN RAILWAY COMPANY

v.

LINDA BAKER *et al.*

The Court of Appeals hereby passes the following order:

Upon considering of motions for reconsideration filed by appellant Norfolk Southern Railway Company and appellee Linda W. Baker, individaully [sic] and as representative of Phil Baker's estate, the same are hereby denied.

Due to a clerical error on page 10 of the opinion issued in the above styled case, decided March 11, 1999, we hereby substitute a new page 10 to this opinion to correct the error. This substitution deletes the word, "immaterial," in Division 4 of the opinion and replaces it with the word, "material."

Court of Appeals of the
State of Georgia
Clerk's Office, Atlanta

Mar. 30, 1999

APPENDIX D

IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA

Civil Action No. 42133

LINDA BAKER, Individually and as
Personal Representative of the
Estate of Phil Baker,

Plaintiff,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

ORDER

The Court having carefully considered defendant's motion for new trial and motion for judgment notwithstanding the verdict,

IT IS HEREBY ORDERED that both motions are denied.

This 15th day of April, 1998.

/s/ J. Taylor Phillips
J. TAYLOR PHILLIPS
Judge
State Court of Bibb County

APPENDIX E

STATE COURT OF BIBB COUNTY
STATE OF GEORGIA

Case No. 42133

LINDA BAKER, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PHIL BAKER

vs.

NORFOLK SOUTHERN RAILWAY COMPANY

JUDGMENT

This action came on for trial before the Court and a jury, Honorable J. Taylor Phillips, presiding, and the issues having been tried and the jury having rendered its verdict;

IT IS ORDERED AND ADJUDGED that the plaintiff, Linda Baker, Individually, and as Personal Representative of the Estate of Phil Baker recover of the defendant, Norfolk Southern Railway Company the sum of $5,744,225.50 with interest thereon at the legal rate as provided by law, and costs of action.

Dated at Macon, Bibb County, Georgia, this 23rd day of June, 1997.

/s/ J. Taylor Phillips
Judge
State Court of Bibb County

/s/ [Illegible]
Plaintiff's Attorney

FILED IN OFFICE

THIS 23rd DAY OF June, 1997.

FILED
OCT
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 99-556

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

LINDA BAKER, Personal Representative
of the Estate of Phil Baker, Deceased,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE GEORGIA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

MARC T. TREADWELL
CHAMBLISS, HIGDON & CARSON
P.O. Box 246
Macon, Georgia 31202-0246
(912) 745-1181

ROBERT E. SHIELDS
RALPH I. KNOWLES, JR.*
DOFFERMYRE SHIELDS CANFIELD
KNOWLES & DEVINE
1355 Peachtree Street, N.E.
Suite 1600
Atlanta, Georgia 30309
(404) 881-8900

Attorneys for Respondent

* *Counsel of Record*

155892

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Respondent Disputes Petitioner's Assertions Regarding The Question Presented, Jurisdiction And The Statement Of The Case	1
A. Question Presented	2
B. Jurisdiction	2
C. Statement of the Case	2
Argument	8
The Petition For Certiorari Should Be Denied	8
A. The Question Presented by Norfolk Southern in the Petition Was Not Preserved For Appeal Because It Was Not Raised in the Georgia Courts.	8
1. The Question Presented Must Have Been Raised and Decided Below.	8
2. Norfolk Southern Did Not Raise the Federal Question in State Court.	9
3. The Georgia Courts Did Not Rule on the Claimed Federal Question.	14

Contents

Page

B. The Georgia Court of Appeals Correctly Concluded that There Was Sufficient Evidence of Causation. 16

1. The Georgia Statute on Expert Testimony Governs. 17

2. The Medical Causation Evidence Was Admissible Under *Daubert*. 20

3. The Causation Evidence Was More Than Sufficient 24

Conclusion 26

TABLE OF CITED AUTHORITIES

Page

Cases:

Aparicio v. Norfolk & Western Ry. Co., 84 F.3d 803 (6th Cir. 1996) 24

Brown v. Western Railway of Alabama, 338 U.S. 294 (1949) 18

Cardinale v. Louisiana, 394 U.S. 437 (1969) 2, 8, 9

Central Vermont Ry. Co. v. White, 238 U.S. 507 (1915) 17

Chesapeake & Ohio Ry. Co. v De Atley, 241 U.S. 310 (1916) 17

Claar v. Burlington N. R.R. Co., 29 F.3d 499 (9th Cir. 1994) 12

Connecticut Mut. Life Ins. Co. v. Moore, 333 U.S. 541 (1948) 9

Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994) 24

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) ..... *passim*

Delong v. State, 185 Ga. App. 314, 363 S.E.2d 811 (1987) 7, 11

Cited Authorities

Page

Eubanks v. CSX Transp., Inc., 223 Ga. App. 616, 478 S.E.2d 387 (1996) 19

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) ... 8

Faulkenberry v. Kansas City S. Ry. Co., 602 P.2d 203 (Okla. 1979) 19

General Electric v. Joiner, 118 S. Ct. 512 (1997) . 20

Heffernan v. Home Depot USA, Inc., 226 Ga. App. 167, 486 S.E.2d 51 (1997) 7

Hughes v. International Diving & Consulting Servs., Inc., 68 F.3d 90 (5th Cir. 1995) 12

Keith v. Burlington N. R.R. Co., 889 S.W.2d 911 (Mo. App. 1994) 19

Marbled Murrelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996) 12, 23

McDaniel v. CSX Transp., Inc., 955 S.W.2d 257 (Tenn. 1997), *cert. denied*, 118 S. Ct. 2296 (1998) 19

Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916) 17

Riggins v. Nevada, 504 U.S. 127 (1992) 8

Cited Authorities

	Page
Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500 (1957)	10, 15, 24
Smelser v. Norfolk Southern Ry. Co., 105 F.3d 299 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 67 (1997)	12
St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409 (1985)	18
Street v. New York, 394 U.S. 576 (1969)	9
Stutzman v. CRST, Inc., 997 F.2d 291 (7th Cir. 1993)	19
Webb v. Webb, 451 U.S. 493 (1981)	8, 9
Statutes:	
28 U.S.C. § 1257(a)	2
O.C.G.A. § 9-11-50 (a)	13
Rules:	
Fed. R. Civ. P. 50(a)(2).	13
F.R.E. 702	14
Georgia Supreme Court Rule 40	16
United States Supreme Court Rule 14(g)(i)	9
United States Supreme Court Rule 24	1

Page

Other Authorities:

49 C.F.R. § 229.43 3

16B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d.*, § 4023 (1996) 18

RESPONDENT DISPUTES PETITIONER'S ASSERTIONS REGARDING THE QUESTION PRESENTED, JURISDICTION AND THE STATEMENT OF THE CASE

The Georgia Court of Appeals held in this Federal Employers' Liability Act ("FELA") personal injury and wrongful death action that the unchallenged testimony of plaintiff's lead expert witness was more than sufficient to authorize the jury's finding that diesel exhaust caused, or played a role in causing, the decedent's fatal nasopharyngeal cancer. 514 S.E.2d 448, 452 (Ga. Ct. App. 1999) (hereinafter "Ct. App. Op.", a copy of which is reproduced in the Appendix to the Petition for Certiorari.) Defendant Norfolk Southern Railway Company ("Norfolk Southern"), having failed to persuade the Georgia Supreme Court to grant its petition for certiorari, now petitions the United States Supreme Court to grant certiorari on an issue that was never raised in the state courts and was not decided by the Georgia Court of Appeals. In its petition, Norfolk Southern not only asserts a federal question never raised below, but in an apparent effort to persuade this Court to review the case, it grossly misstates and distorts the record evidence regarding the factual background. In accordance with Rule 24 of the Rules of the Supreme Court of the United States, Respondent Linda Baker first will set out her disagreement with the presentation of Petitioner Norfolk Southern regarding the "Question Presented", Jurisdiction, and the Statement of the Case.

A. Question Presented

Norfolk Southern asserts that the "Question Presented" is whether unreliable opinion testimony may constitute sufficient evidence in an FELA case. That "Question" was never raised in the state courts and was not decided by the Georgia Court of Appeals. Petitioner never objected to the referenced opinion testimony at trial, did not raise the issue at trial or in the Court of Appeals, and never sought to have the Supreme Court of Georgia decide the question. Norfolk Southern cannot assert the question for the first time in the United States Supreme Court. Moreover, the premise of its statement of the issue, that the opinion testimony was not reliable, is incorrect. The testimony was "scientifically reliable", was admissible under the governing Georgia statute, and would have been admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

B. Jurisdiction

This Court lacks jurisdiction to hear this state court case because the alleged federal questions were not raised in the state courts and not decided by the highest court in the state. The relevant jurisdiction statute, 28 U.S.C. § 1257(a), does not provide for jurisdiction unless the federal issues were raised and decided by the state court. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

C. Statement of the Case

Respondent Linda Baker also disputes Norfolk Southern's Statement of the Case. Petitioner has distorted the nature of plaintiff's claim and misstated the record evidence on medical causation. The basis for recovery, which

was not challenged on appeal, was that Norfolk Southern failed to provide Phil Baker with a safe place to work, in violation of FELA and the Locomotive Boiler Inspection Act, by not using reasonable and appropriate means to prevent the entry of hazardous levels of diesel exhaust into the locomotive cabs in which Mr. Baker worked, as required by 49 C.F.R. § 229.43, long after it knew that it was exposing its employees such as Mr. Baker to hazardous levels of diesel exhaust.

Contrary to the suggestion of Norfolk Southern in its Petition, the alleged negligence was not merely that Mr. Baker was exposed to normal levels of diesel exhaust. Rather, the record evidence was that Norfolk Southern was the only major American railroad which operated its locomotives with the exhaust stack in front on the unairconditioned cab such that diesel exhaust from the stack poured into the cab, filling it with black smoke. (Transcript, hereinafter "T.", 210, 81, 85, 387, 391). Norfolk Southern received numerous complaints from its train crews that diesel exhaust was making them sick. (T.867-68, 923-28). Norfolk Southern in turn complained to the manufacturer, the General Electric Company, who investigated the problem and concluded that the only effective solution was to run the locomotives with the short hood forward, like other railroads, so that the exhaust stack was behind the cab. (T.287-90, 298-99). Norfolk Southern refused to change its practice despite GE's recommendation. (T.299).

Norfolk Southern knew that exposure to excessive levels of diesel exhaust was hazardous to its employees. It had been known for years that diesel exhaust causes eye and throat irritation, chronic respiratory disease, and contains various carcinogens. (T.607, 645, 734, 979). As early as 1979, the

U.S. Environmental Protection Agency was considering regulating diesel exhaust under the Clean Air Act because it had been found to be mutagenic, and therefore was presumed to be a cancer-causing agent. (T.725-739). By the mid-1980s various studies had found that diesel exhaust caused cancer in laboratory animals, and a major study by the Harvard School of Public Health found that diesel exhaust caused cancer in railroad workers. (T.642, 741, 789-90). Finally, in 1988, the National Institute of Occupational Safety and Health ("NIOSH"), concluded that diesel exhaust caused cancer and recommended that workplace exposure be minimized. Norfolk Southern was aware of the studies and the NIOSH recommendations, but it took no action to reduce diesel exhaust exposure to its train crews. (T.877-78).

Not only did NIOSH consider diesel exhaust a probable human carcinogen, the U.S. Environmental Protection Agency and the World Health Organization's International Agency for Research on Cancer have concluded that diesel exhaust is a probable human carcinogen. (T.736, 744, 748, 751-52). Diesel exhaust contains many of the same carcinogens as cigarette smoke but in much higher concentrations.

Despite the almost universal agreement in the scientific community that diesel exhaust causes human respiratory cancer, Norfolk Southern in its Petition labels the scientific evidence of causation in this case as unreliable, and in fact premises its whole argument on that unsubstantiated assertion. The record evidence of causation in this case was overwhelming. It was admissible and sufficient under any relevant standard, including the federal rule set out in *Daubert*.

In 1991, after years of exposure to diesel exhaust because of Norfolk Southern's refusal to operate its locomotives properly, Phil Baker was diagnosed with nasopharyngeal cancer. Mr. Baker received high dose radiation and chemotherapy, causing him excruciating pain and disabling him. (T.518-19). When Mr. Baker's condition temporarily improved, his principal physician, Dr. Robert Howard, had to make a recommendation about returning to work. Dr. Howard researched the literature, and based upon his own knowledge and experience with cancer causation, advised Mr. Baker not to return to work because his exposure to diesel exhaust at work probably was the cause of the cancer. (T.519-20).

Toxicologist Dr. Richard Lipsey did an exposure assessment and calculated the levels of various chemical components of diesel exhaust to which Mr. Baker had been exposed at Norfolk Southern. (T.598, 602-606). The levels were in excess of those permitted by the U.S. Occupational Safety and Health Administration. (T.609). Although Dr. Lipsey was not permitted to testify as to medical causation regarding Mr. Baker, as a toxicologist he was allowed to testify that diesel exhaust causes nasopharyngeal cancer. (T.611).

Samuel Epstein, M.D., a full Professor of Occupational and Environmental Health at the School of Public Health, University of Illinois, author of several books and numerous articles on cancer causation, and an internationally-recognized expert in the field, testified that in his opinion, Mr. Baker's diesel exhaust exposure at Norfolk Southern caused his nasopharyngeal cancer. (T.728). The basis for his opinion was that diesel exhaust contained numerous recognized carcinogens, that diesel exhaust had been

confirmed as a mutagenic, that diesel exhaust and its components caused cancer, including nasopharyngeal cancer, in well-designed animal tests, and that diesel exhaust and its components had been found to cause cancer, including nasopharyngeal cancer, in over forty human studies, involving thousands of exposed workers. (T.728-744). As a result, every governmental or independent research group who had evaluated diesel exhaust regarded it as a cancer-causing agent. (*Id.* and 642-44).

Norfolk Southern asserts on page 4 of its Petition that the expert witnesses "could not identify even a *single* epidemiological study linking diesel exhaust with nasopharyngeal cancer." In fact, both Dr. Epstein and Dr. Lipsey identified three studies linking whole diesel exhaust with nasopharyngeal cancer, (T.729-32), and approximately forty studies, involving thousand of workers, which "clearly showed the association of formaldehyde, [one of the principal components of diesel exhaust], and nasopharyngeal cancer." (T.742-43).

Norfolk Southern also misstates the record evidence regarding smoking, drinking and woodworking. It claims on page 2 of its Petition that "Mr. Baker smoked cigarettes, drank heavily, and did woodworking — all activities known to cause cancer of the nasopharynx." The undisputed evidence was that Mr. Baker quit smoking and drinking years before he got cancer. (T.70-71). More importantly, there was no evidence, even from Norfolk Southern's experts that smoking, drinking or woodworking caused Mr. Baker's cancer. Norfolk Southern's expert testified that there were studies going both ways and "the jury is still out." (T.960-64). Mr. Baker's treating physician, Dr. Howard, testified that neither the history of smoking or drinking had anything

to do with the cancer. (T.525-27). Dr. Epstein agreed and pointed out that none of the U.S. Surgeon General reports on smoking and health had even listed nasopharyngeal cancer as a cancer caused by smoking, and that there was no evidence that alcohol consumption caused nasopharyngeal cancer. (T.744-45, 749-50). Dr. Mark Williams, Mr. Baker's treating radiation oncologist, testified that alcohol and tobacco abuse have not been shown to be risk factors for nasopharyngeal cancer. (T.475). Similarly there was no evidence that woodworking had anything to do with causing the cancer.

Norfolk Southern also misleads this Court regarding the proceedings below, particularly in regard to whether it raised the issue now asserted. It implies that it properly objected to the causation testimony by filing a motion in limine. Although Norfolk Southern filed a motion in limine almost a year before trial, it did not insist on a ruling before or during trial and it never objected to the introduction of the evidence at trial. Under Georgia procedural law the failure to insist on a ruling on the motion and the failure to object to the admission of the testimony waives any assertion of error on the matter. *Heffernan v. Home Depot USA, Inc.*, 226 Ga. App. 167, 486 S.E.2d 51 (1997) and *Delong v. State*, 185 Ga. App. 314, 363 S.E.2d 811 (1987). Norfolk Southern simply failed to preserve any issue regarding the admissibility of the medical causation evidence for appeal.

ARGUMENT

THE PETITION FOR CERTIORARI SHOULD BE DENIED

A. The Question Presented by Norfolk Southern in the Petition Was Not Preserved For Appeal Because It Was Not Raised in the Georgia Courts.

1. The Question Presented Must Have Been Raised and Decided Below.

The jurisdictional statute and controlling authority require that the tendered federal questions for Supreme Court review must have been asserted in and decided by the state courts. This Court has long maintained that it will not consider questions that are raised for the first time in seeking review of a state court decision. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). Sometimes this Court has stated that it had "no jurisdiction" to consider an argument which was not preserved by being properly raised below. *See, e.g., Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). In other cases this Court has simply repeated the black letter principle that because the argument was not presented in the state courts, it will not be addressed by the Supreme Court. *See, e.g., Riggins v. Nevada*, 504 U.S. 127, 133 (1992). Whatever the rationale, there can be no doubt that a fundamental procedural requirement is that the question presented was in fact at issue and decided by the state court.

There are powerful policy considerations underlying the procedural requirement that federal questions first be presented to the state courts. As Justice White explained in *Webb v. Webb,* 451 U.S. 493 (1981):

> Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements.

Id. at 499. There are also important practical considerations for insisting that federal issues be raised first in the state court system, including the development of an adequate record and the consideration of independent state grounds. *Cardinale v. Louisiana, supra*, at 439.

As a result of these considerations, the party seeking review must carry the burden of proving that the federal questions were presented to the state courts. *Webb v. Webb, supra*, at 495; and Rule 14(g)(i) of the Rules of the Supreme Court of the United States. It is not sufficient to present the questions only to an intermediate appellate court. They must be presented to the highest state court. *Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S 541, 544 (1948). Moreover, this Court has frequently stated that "when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts". *Street v. New York*, 394 U.S. 576, 582 (1969).

2. Norfolk Southern Did Not Raise the Federal Question in State Court.

Norfolk Southern did not preserve for review the federal issues it asserts in its Petition because it did not properly raise them in the Georgia courts. It attempts to avoid the fact that it did not raise the issues by stating the Question

Presented in a fashion that obscures its real arguments. It asserts that the Question Presented is whether opinion testimony that does not meet the requirements of *Daubert* constitutes sufficient evidence of causation in an FELA case. It further claims that there is a split in the federal circuits on the sufficiency of evidence standard in an FELA case and that the Georgia Court of Appeals adopted a scintilla of evidence standard.

In reality the Question Presented includes at least four arguments regarding federal law. It is premised on the argument that *Daubert* applies in an FELA case tried in state court instead of a state statute on the admissibility of scientific testimony. Secondly, the Question assumes that the scientific testimony in the case was inadmissible under *Daubert*. Third, it includes the argument that if scientific testimony did not meet the requirements of the *Daubert*, it would not be sufficient evidence to uphold a verdict, even if the defendant failed to object to the evidence. Fourth, the Question Presented is based on an argument that the scintilla of evidence rule was not adopted by this Court in *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957) but was applied by the Georgia Court of Appeals.

None of the four arguments were raised by Norfolk Southern in the Georgia courts. First, it did not object to the evidence at trial at all. It never asserted that *Daubert* applied in an FELA case tried in state court, either in the trial court or on appeal. Although it cited *Daubert* and some other federal cases in its motion in limine and in its appellate briefs, they were cited for the proposition that Georgia law would not admit the evidence, not for the argument that federal law applied instead of Georgia law. This Court, of course, does not have any jurisdiction to decide what the Georgia

law of evidence requires and is bound by the decision of the Georgia courts. Norfolk Southern never asserted before its Petition for Certiorari that federal law required that the *Daubert* Rule be applied in an FELA case tried in state court, instead of the state rule of evidence.

Similarly, Norfolk Southern never asserted below that the scientific testimony was inadmissible under the *Daubert* Rule. It never sought to have the trial judge conduct a hearing to review the factors stated in *Daubert*. It never asserted in the Georgia Court of Appeals that the evidence was inadmissible under *Daubert*. Nor could it have made that argument since it failed to object to admissibility of the evidence at trial and therefore did not preserve the issue for appeal. Under Georgia procedural law, its prior motion in limine did not preserve any issue of admissibility because it did not insist on a ruling by the trial court before or during trial. *Delong v. State*, 185 Ga. App. 314, 363 S.E.2d 811 (1987).

Norfolk Southern attempts to finesse its failure to object to the evidence at trial or to assert in the Georgia Court of Appeals that the federal *Daubert* Rule applied instead of the Georgia evidence rule, by asserting that even if the testimony was admitted without objection, it can raise the *Daubert* issue under the pretext of a sufficiency of the evidence argument. Its assertion should be rejected for at least two reasons. First, Norfolk Southern cannot avoid its failure to object to the evidence on the basis that it moved for a directed verdict on the basis of the sufficiency of the evidence. It asserts on page 17 of its Petition that "courts have looked to *Daubert* in determining sufficiency-of-evidence questions in FELA actions." The cases it cites do not support the assertion.

One of the cases cited by Norfolk Southern in support of its assertion was *Marbled Murrelet v. Babbitt,* 83 F.3d 1060 (9th Cir. 1996). The case not only does not support the assertion but, in fact, compels just the opposite conclusion. The Ninth Circuit held that the defendant waived its *Daubert* objections by failing to request a ruling on the admissibility of the evidence, just as Norfolk Southern failed to request a ruling in this case and could not assert them under the pretext of a motion on the sufficiency of the evidence. It reasoned that by failing to object the defendant deprived the plaintiff of "the opportunity to lay a better foundation for the evidence". *Id.* at 1067. The Court concluded that permitting the defendant to challenge on appeal the reliability of the scientific evidence under *Daubert* "in the guise of an insufficiency-of-the-evidence argument" would give the defendant an unfair advantage and would not be permitted. *Id.*

The other federal cases cited by Petitioner, *Smelser v. Norfolk Southern Ry. Co.,* 105 F.3d 299 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 67 (1997) and *Hughes v. International Diving & Consulting Servs., Inc.*, 68 F.3d 90 (5th Cir. 1995), do not support its argument because in both there was an objection at trial on the basis of *Daubert*. The decisions merely dealt with whether the objections should have been sustained and whether without the scientific evidence there was sufficient evidence. Neither support a claim that a party can fail to object to the admissibility of the evidence at trial but raise the same argument on appeal under the guise of the sufficiency of the evidence. As noted in *Claar v. Burlington N. R.R. Co.,* 29 F.3d 499 (9th Cir. 1994), another case incorrectly cited by Norfolk Southern, the sufficiency of causation evidence under FELA and the admissibility of expert testimony are separate and distinct issues. *Id.* at 503.

Second, even if the reliability of the causation evidence can be raised on motion for directed verdict despite the fact that no objection was made to the evidence, Norfolk Southern did not raise in its motion at trial any of the arguments it now asserts. Specifically it did not contend as it asserts in the Question Presented that "unreliable" expert testimony under the federal *Daubert* Rule is insufficient evidence of causation in an FELA case tried in state court. The only bases given for its motion for directed verdict at trial were: (1) that "there's no study linking nasopharyngeal cancer itself with diesel exhaust"; and (2) that "all the studies shown have relative risks well below two." (T.828). Both of the bases were factually incorrect. Drs. Lipsey and Epstein had referenced three studies linking nasopharyngeal cancer with whole diesel exhaust and over forty studies showing one of the principal components of diesel exhaust caused nasopharyngeal cancer, a number of which had relative risks substantially in excess of two. (T.729-32, 743).

Those two limited factual arguments clearly did not preserve for appeal the sufficiency-of-the-evidence argument now asserted in the Question Presented in the Petition for Certiorari. Georgia procedural rules, just like the federal rules, require that the basis for a motion for judgment as a matter of law be asserted with specificity at trial in order to preserve it for appeal. O.C.G.A. § 9-11-50 (a). Fed. R. Civ. P. 50(a)(2).

Norfolk Southern also failed to assert the insufficiency-of-the-evidence argument set out in the Question Presented in the Georgia Court of Appeals. Although it claimed that the trial court erred in denying its motion for a directed verdict and its post-trial motion, the basis for its claim was not that *Daubert* applied in an FELA case tried in state court and that the causation testimony was not admissible. Rather, its argument in the Georgia Court of Appeals was based on

the incredible assertion that Dr. Epstein's testimony about specific causation was too "equivocal" because he used the word "incriminates". Consequently the decision focused on rejecting that argument by reciting the clear meaning of Dr. Epstein's testimony.

In its Petition for Certiorari to the Georgia Supreme Court, Norfolk Southern also failed to assert the arguments tendered here. It did not claim that the *Daubert* Rule applied in the Georgia courts when they heard FELA cases. It did not claim that the evidence was insufficient because the causation evidence would be inadmissible under the Rule. Instead, it claimed that the Court of Appeals erred in concluding that the evidence was admissible under Georgia law and it urged the Court to adopt a new test for the admissibility of scientific evidence in Georgia. Thus neither the Georgia Court of Appeals nor the Georgia Supreme Court was ever asked by Norfolk Southern to rule on the specific issue which it now claims is the "Question Presented" by this case.

3. The Georgia Courts Did Not Rule on the Claimed Federal Question.

Neither the Georgia Court of Appeals nor the Georgia Supreme Court ruled on the issues now asserted by Norfolk Southern. The Georgia Court of Appeals decision mentions that *Daubert* was decided under F.R.E. 702 instead of the Georgia statute on the admissibility of expert testimony not because either Norfolk Southern was raising, or the Court was ruling on, the issue of whether the federal rule of evidence applied in the trial of an FELA case in a Georgia state court. It referenced *Daubert* only because Norfolk Southern cited cases decided under the federal rule in support

of its argument that the testimony was not admissible under Georgia law. Since Norfolk Southern never argued that federal law governed on the admissibility of the scientific evidence, and never even asserted that the evidence was inadmissible, the Court of Appeals never was asked and did not decide that issue.

Similarly the Georgia Court of Appeals did not decide the case based on the scintilla of evidence rule, as claimed by Petitioner. Norfolk Southern argues that the Georgia Court of Appeals upheld the verdict based on the scintilla of evidence rule and that there is a split in the federal circuits on whether an FELA plaintiff need present only a scintilla of evidence or something more. Even if there is a split in the circuits, the Court of Appeals did not decide the case on the scintilla of the evidence rule. In fact, the Georgia Court of Appeals decision appears to have been based on a standard more rigorous than any federal circuit court has required.

After reviewing in detail Dr. Epstein's testimony, the Court of Appeals held that it was sufficient to authorize the verdict. It noted that under FELA the test is "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury", quoting from the controlling decision of this Court in *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957). Ct. App. Op. at 7. But the Georgia Court of Appeals went further and held that even if the lesser quantum of evidence standard under FELA was not applicable and the normal sufficiency of evidence standard required in cases generally applied, the evidence was "sufficient to demonstrate a 'reasonable probability' of a causal connection between the decedent's exposure to diesel exhaust and his nasopharyngeal cancer." *Id.* There simply is no basis for

Norfolk Southern's assertion that the decision was based on the scintilla of the evidence rule. Moreover, as will be discussed in more detail *infra* there was more than sufficient evidence under any possible standard to support the jury's conclusion of causation.

Finally, it must be noted that Norfolk Southern did not contend in its Petition for Certiorari to the Georgia Supreme Court that the Court of Appeals applied the wrong standard for sufficiency of the evidence. In fact in its petition, it reversed its argument from the Court of Appeals and claimed that the issue was admissibility, not sufficiency of the evidence. It no doubt took that position because Rule 40 of the Rules of the Supreme Court of Georgia provided that certiorari normally would not be granted for an alleged insufficiency of the evidence. In any event, Petitioner never requested the Georgia Supreme Court to decide the standard to be used for determining the sufficiency of the evidence and therefore, is precluded from attempting to raise the issue in this Court.

B. The Georgia Court of Appeals Correctly Concluded that There Was Sufficient Evidence of Causation.

Norfolk Southern is really challenging the admissibility of the causation evidence. It has phrased the issue and fashioned its arguments as a challenge to the sufficiency, instead of admissibility, of the evidence because it did not preserve any issue on admissibility. The whole premise of its sufficiency of the evidence argument is that the federal *Daubert* Rule applies in an FELA case tried in state court, instead of the state rule of evidence, and it claims that the evidence here does not comply with the federal rule. Respondent will address first Norfolk Southern's premise that *Daubert* applies.

1. The Georgia Statute on Expert Testimony Governs.

It has long been black-letter law that federal law controls on substantive issues in an FELA case, but state law governs on procedural issues such as the admissibility of expert testimony. There is no conflict in the federal circuits or between the various state courts on the principle. The substantive/procedural distinction in an FELA case tried in state courts is universally accepted. The principle appears to stem from a series of early decisions in this Court.

In *Central Vermont Ry. Co. v. White*, 238 U.S. 507 (1915) this Court held that the question of whether the defendant had the burden of proof on contributory negligence was governed by federal law in an FELA case tried in state court. In reaching its holding the Court noted that procedural matters such as "the form of the action, sufficiency of the pleadings, [and] rules of evidence" are governed by state law, but concluded that the burden of proof on contributory negligence was not a procedural matter but was substantive, and therefore governed by federal law. *Id.* at 511-12. A year later in *Chesapeake & Ohio Ry. Co. v De Atley*, 241 U.S. 310 (1916) the Supreme Court considered whether the state practice instead of the federal practice regarding jury instructions governed in an FELA case tried in state court. It affirmed the principle that local rules of practice and procedure govern, citing *Central Vermont Ry. Co.* and *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916). In *Bombolis* the Court held that a state rule allowing a nonunanimous verdict governed instead of the Seventh Amendment unanimity requirement. The Court reasoned that because Congress provided for the enforcement of a federal right in state courts under FELA, it intended state procedure to govern.

In the years since, this Court has often repeated the general principle that FELA cases adjudicated in state courts are subject to state procedural rules, including the rules of evidence. *See, e.g., St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985) and the cases cited therein. Although on some issues it is not easy to distinguish substance from procedure, generally this Court has refused to apply state procedural rules only when they operate to defeat the rights of workers under FELA. *See, e.g., Brown v. Western Railway of Alabama*, 338 U.S. 294, 296 (1949) (holding, after acknowledging the general principle, that the federal right created by FELA "cannot be defeated by the forms of local practice").

The policy behind the general principle is fundamental to our system of distinct federal and state courts, both of which can hear claims based on the other's law. As Professors Wright, Miller and Cooper noted in their treatise:

> There are compelling reasons for adhering to the general rule that federal law takes state courts as it finds them. The Supreme Court itself has an interest in permitting the state courts to follow procedure that they find familiar, uniform, and good. This interest is so strong, and so well accepted, that state courts and litigants routinely employ state procedure without further thought both in cases that mix federal questions with state questions and in cases that present only federal questions.

16B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d.*, § 4023 at 345 (1996).

These comments are particularly applicable to the rules of evidence. It is no doubt true that all state courts which have tried FELA cases have routinely applied their own rules of evidence instead of the Federal Rules of Evidence, just as federal courts in diversity cases apply the Federal Rules instead of state law. Every state case specifically addressing the issue, including Georgia, has ruled that the state rules of evidence apply instead of the Federal Rules in an FELA action tried in state court. *Eubanks v. CSX Transp., Inc.*, 223 Ga. App. 616, 478 S.E.2d 387 (1996); *Keith v. Burlington N. R.R. Co.*, 889 S.W.2d 911, 919 (Mo. App. 1994); and *Faulkenberry v. Kansas City S. Ry. Co.*, 602 P.2d 203, 208 n.19 (Okla. 1979). Similarly, federal courts have held that the Federal Rules of Evidence apply in diversity actions based on state law because the rules of evidence are procedural and governed by the law of the forum. *See, e.g., Stutzman v. CRST, Inc.*, 997 F.2d 291, 295 (7th Cir. 1993) (holding that admissibility of expert testimony was procedural, not substantive).

The exact issue was presented recently in *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997), *cert. denied*, 118 S. Ct. 2296 (1998). The Tennessee Supreme Court applied state law instead of federal law in evaluating the admissibility of scientific testimony in an FELA case tried in state court. CSX petitioned for certiorari to this Court on this issue of whether the federal *Daubert* Rule instead of state law should govern, and this Court denied the petition. The Georgia courts, consistent with the recognized practice in all state courts and all of the reported decisions, applied the Georgia rule on the admissibility of expert testimony.

2. The Medical Causation Evidence Was Admissible Under *Daubert*.

Even if the federal *Daubert* Rule applied and Norfolk Southern had objected to the admissibility of the evidence, it is clear from the record that the evidence was scientifically reliable and more than sufficient under *Daubert*. Moreover, admission of the evidence clearly was not an abuse of discretion under *General Electric v. Joiner*, 118 S. Ct. 512 (1997). Norfolk Southern's assertion that the medical causation evidence was unreliable simply is not supported by the record.

Plaintiff's lead expert on medical causation was Dr. Samuel Epstein from the University of Illinois School of Public Health, whose "unchallenged testimony . . . qualified him as an expert in chemistry, pathology, internal medicine, toxicology, cancer causation and the carcinogenic properties of diesel exhaust." Ct. App. Op., p.5. Dr. Epstein testified "that the preponderance of evidence clearly incriminates diesel exhaust as the cause of [Phil Baker's] fatal nasopharyngeal cancer." (T.728)

As the Georgia Court of Appeals explained in its review of the record evidence, Dr. Epstein explained that his opinion was based on the generally-accepted methodology for determining whether a chemical has caused or contributed to causing cancer, including the evidence of the amount and duration of exposure, the chemistry of diesel exhaust, genetic testing, animal studies and human studies. (T.722-25, 728). When asked what evidence regarding the chemistry of diesel exhaust led him "to your conclusion that diesel exhaust caused Phil Baker's nasopharyngeal cancer", (T.734), he responded that diesel exhaust contains a wide range of chemicals known to cause

cancer. (T.734-39). He noted that diesel exhaust had levels of some known carcinogens five hundred times higher than cigarette smoke. (T.734). He also testified that there was "clear and unequivocal and unarguable evidence" that one of the major components of diesel exhaust, formaldehyde, causes nasopharyngeal cancer. (T.735).

In regard to genotoxicity, Dr. Epstein explained that there have been a wide range of studies starting in the late 70's by the Environmental Protection Agency showing that whole diesel exhaust induces mutations or genetic changes in various tests. (T.740). The significance of such genetic testing is that it is considered to be strong evidence of carcinogenicity. (T.725).

Dr. Epstein next discussed the animal studies. A fundamental principle of toxicology is that well-designed animal studies are predictive of human results. (T.596). Dr. Epstein explained that whole diesel exhaust had caused respiratory cancers in various animal models. One of the principal components of diesel exhaust, formaldehyde, had been shown in numerous animal studies to cause the animal equivalent of nasopharyngeal cancer. (T.741). Finally, Dr. Epstein discussed the published studies of exposed workers like Phil Baker. He testified that there were three epidemiological studies that showed that whole diesel exhaust caused nasal cancers in railroad and other workers. (T.730-32, 742). Dr. Epstein also noted that there were a large number of studies, including thirteen major reports, which "clearly showed the association of formaldehyde and nasopharyngeal cancer." (T.742). One of the studies was by a National Cancer Institute senior scientist and involved the review of thirty-seven epidemiologic studies, involving thousand of workers. (T.742-43). Dr. Epstein concluded his review of the scientific evidence by noting that all of the

relevant governmental agencies from the National Cancer Institute to the International Agency for Research on Cancer have concluded that diesel exhaust and its components were probable human carcinogens. (T.744).

Plaintiff also presented the testimony of Dr. Richard Lipsey, an expert in toxicology. Dr. Lipsey did an exposure assessment in connection with Phil Baker in which, based on the available data, he calculated the level of various chemical components of diesel exhaust to which Mr. Baker was exposed in his employment. (T.598, 602-606). He opined that the levels were in excess of those permitted by governmental agencies. (T.609). Although Dr. Lipsey was not permitted to testify as to medical causation regarding Mr. Baker, as a toxicologist he was allowed to testify that diesel exhaust is a cause of nasopharyngeal cancer. (T.611).

Finally, Plaintiff offered the testimony of Robert Howard, M.D., one of Mr. Baker's treating physicians. He investigated the probable cause of Mr. Baker's nasopharyngeal cancer and told Mr. Baker at the time that the most probable cause was his prolonged exposure to diesel exhaust at work. (T.520). Dr. Howard reaffirmed his opinion at trial and testified that neither Mr. Baker's prior smoking, alcohol consumption, or woodworking activities played any role in causing his cancer. (T.526-28).

Norfolk Southern asserts that the above evidence was unreliable under *Daubert* because plaintiff's expert witness "could not identify even a *single* epidemiological study linking diesel exhaust with nasopharyngeal cancer." In fact, both Dr. Epstein and Dr. Lipsey identified three studies that associated whole diesel exhaust with nasopharyngeal cancer,

(T.729-32), and approximately forty studies, involving thousand of workers, which "clearly showed the association of formaldehyde, [one of the principal components of diesel exhaust], and nasopharyngeal cancer." (T.742-43). Norfolk Southern also asserts that a draft E.P.A. report concluded that formaldehyde was not carcinogenic. It did nothing of the sort. E.P.A. has long recognized formaldehyde as a probable human carcinogen. (T.819-21, 752).

The extensive testimony on medical causation clearly demonstrated that the factors set out in *Daubert* required admission of the evidence, including general acceptance, peer-reviewed publication, rate of potential error, and testing. Respondent attempted to offer more extensive testimony on the factors, but the Court, having no objection to the evidence, required counsel to move on. (T.735-37, 743, 746). Norfolk Southern, having failed to object, cannot now assert that there was insufficient consideration of the factors. *Marbled Murrelet v. Babbitt*, *supra*, at 1067.

Norfolk Southern is remarkably silent about the testimony of its own medical expert, Dr. William Morgan. Although Dr. Morgan is a professional witness who testifies exclusively on behalf of industrial defendants in cases involving exposure to almost any hazardous substance in the workplace, particularly on behalf of the railroad industry, he essentially confirmed the elements of Plaintiff's causation evidence. (T.969-972). He acknowledged that diesel exhaust contains one or more chemicals that are generally regarded as carcinogenic and that diesel exhaust has been found to be more mutagenic than cigarette smoke. (T.979). Indeed, he conceded that one study showed diesel smoke is one hundred times more potent than cigarette smoke. (T.981). He acknowledged that formaldehyde is mutagenic and that animal studies have documented that it causes nasal cancers. (T. 996-997).

3. The Causation Evidence Was More Than Sufficient

Not only was the evidence reliable under *Daubert*, it was more than sufficient in an FELA case to support the jury verdict. The standard of review of the sufficiency of the evidence in an FELA case is a lenient one, particularly in regard to causation. This Court held in *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 507 (1957) that the jury could determine causation if there is any evidence that justifies with reason, the conclusion that employer negligence played any part, even the slightest, in producing the injury. More recently, in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994), the Supreme Court reaffirmed that there was a "relaxed standard of causation" in FELA cases, citing *Rogers*.

Norfolk Southern argues that there is a split in the Circuits between whether *Rogers* adopted a "scintilla of evidence" rule or a "more than a scintilla" standard, citing *Aparicio v. Norfolk & Western Ry. Co.*, 84 F.3d 803 (6th Cir. 1996). The Sixth Circuit in *Aparicio* pointed out, however, that the more-than-a-scintilla approach may be a distinction without a difference:

> "More than a scintilla" means precious little more than a scintilla given the Supreme Court's view that Congress has favored Federal Employers' Liability Act plaintiffs with a jury resolution of all colorable factual issues. *Rogers*, 352 U.S. at 510, 77 S.Ct. at 451. Thus, we hold that *Brady* and *Rogers* require a Federal Employers' Liability Act plaintiff to present more than a scintilla of evidence in order to create a jury question on the issue of employer liability, but not much more.

Id. at 810-11.

In this case the Georgia Court of Appeals noted the lesser quantum of evidence in FELA case, but after reviewing the causation evidence concluded that even if there was no lesser quantum required, the evidence was sufficient to demonstrate a "reasonable probability" of a causal connection between the decedent's exposure and his cancer. Ct. App. Op. at 7. The above discussion of the evidence and any fair reading of the transcript compels the conclusion that even in the absence of a lesser standard in FELA cases, the evidence of causation was scientifically reliable, admissible in evidence, and more than sufficient for a jury to conclude that there was causation.

CONCLUSION

For the reasons stated above, the Petition for Certiorari should be denied.

Respectfully submitted,

ROBERT E. SHIELDS
RALPH I. KNOWLES, JR.*
DOFFERMYRE SHIELDS CANFIELD
KNOWLES & DEVINE
1355 Peachtree Street, N.E.
Suite 1600
Atlanta, Georgia 30309
(404) 881-8900

MARC T. TREADWELL
CHAMBLISS, HIGDON & CARSON
P.O. Box 246
Macon, Georgia 31202-0246
(912) 745-1181

Attorneys for Respondent

* *Counsel of Record*